

# PROFESSIONAL EMPLOYER ORGANIZATION LICENSING ACT

## Part 1 - Definitions

### 58-59-101. Short title.

This chapter is known as the "Professional Employer Organization Licensing Act."

### 58-59-102. Definitions.

In addition to the definitions in Section 58-1-102, as used in this chapter:

- (1) "Adjusted net worth" means stockholder's equity determined in accordance with generally accepted accounting principles, increased by the amount of obligations subordinated to claims of general creditors with a remaining term to maturity in excess of three years, and mandatory redeemable preferred stock with a remaining term to redemption in excess of three years.
- (2) "Board" means the Professional Employer Organization Board created in Section 58-59-201.
- (3) "Client company" means a person or entity that leases any or all of its regular employees from a professional employer organization.
- (4) "Employment agreement" means the written agreement between a professional employer organization and each of its employees who are employed for the purpose of being leased as regular employees to client companies.
- (5) "Engage in practice as a professional employer organization" means to hold oneself out as a professional employer organization, to lease an employee to another person, or to receive any consideration for providing employee leasing services or to expect payment of any consideration for providing employee leasing services.
- (6) (a) "Financial responsibility" means a demonstration of a current and expected future condition of financial solvency evidencing a reasonable expectation to the board that an applicant or licensee can successfully engage in business as a professional employer organization without jeopardizing:
  - (i) the interests of the employees of the professional employer organization who are leased to a client company;
  - (ii) the interests of the client company; and
  - (iii) the interests of the public.(b) Financial responsibility may be determined by an evaluation of the total history concerning the licensee or applicant for licensure, including past, present, and expected condition and record of financial solvency and business conduct.
- (7) "Lease agreement" means the written agreement between a professional employer organization and a client company in accordance with which the professional employer organization leases employees to the client company and the client company leases individuals from the professional employer organization.
- (8) (a) "Professional employer organization," "employee leasing company," or "leasing company" means a person who by contract, or otherwise, agrees to employ a majority of a client's workforce where employer responsibilities for those employees are in fact allocated between or shared by the professional employer organization and the client.
  - (b) The employer responsibilities are considered to be allocated between or shared by the professional employer organization and the client whenever the agreement between the client and the professional employer organization expressly provides for such allocation or sharing or whenever a factual analysis of the client's business reveals such allocation or sharing.

- (c) The term "professional employer organization arrangement" shall be liberally construed so as to include any and all arrangements meeting the criteria for professional employer organizations regardless of the term used.
- (d) The following arrangements are not professional employer organization arrangements for purposes of this chapter:
  - (i) arrangements wherein a person, whose principal business activity is not entering into professional employer organization arrangements, shares employees with a commonly owned company within the meaning of Sections 414(b) and (c) of the Internal Revenue Code of 1986, as amended, and which does not hold itself out as a professional employer organization;
  - (ii) arrangements by which a person assumes responsibility for the product produced or service performed by that person or his agents and retains and exercises primary direction and control over the work performed by the individuals whose services are supplied under the arrangements;
  - (iii) a temporary help arrangement, whereby an organization hires its own employees and assigns them to a client to support or supplement the client's workforce in special work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects; provided, however, that the temporary help arrangement excludes arrangements where the majority of the client's work force has been assigned by a temporary help organization for a period of more than 12 consecutive months; and
  - (iv) any person otherwise subject to licensure under this chapter if, during any fiscal year of the person, the total gross wages paid to employees by the person in this state during such period under one or more professional employer organization arrangements do not exceed 5% of the total gross wages paid to all employees employed by the person during the same period, and provided further, that the person does not advertise or hold itself out to the public as providing arrangements denominated as "professional employer" or "employee leasing" in this state.
- (9) "Regular employee" means an individual who is an employee of a professional employer organization for the purpose of being placed by the professional employer organization as a regular full-time or regular part-time employee of a client company.
- (10) "Represent oneself as a professional employer organization" means to hold oneself out by any means as a professional employer organization.
- (11) "Temporary employee," as may be further defined by rule, means an individual who is an employee of, registered for temporary assignment by, or otherwise associated with a temporary help company that engages in the assignment of individuals as temporary full-time or part-time personnel to fill assignments with a finite ending date to another independent entity.
- (12) "Temporary help company," as may be further defined by rule, means a person or entity that provides temporary employees to fill assignments with a finite ending date to another independent entity in special, unusual, seasonal, or temporary skill shortage situations.
- (13) "Total adjusted liabilities" means total liabilities as stated in an audited financial statement less obligations subordinated to claims of general creditors with a remaining term to maturity in excess of three years.
- (14) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-59-501.
- (15) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-59-502.

## **Part 2 - Professional Employer Organization Board**

**58-59-201. Board.**

- (1) There is created the Professional Employer Organization Board consisting of:
  - (a) three members who are owners or officers of separate licensed professional employer organizations within this state;
  - (b) one member who is an owner or officer of a client company; and
  - (c) one member from the general public.
- (2) The board shall be appointed and serve in accordance with Section 58-1-201.
- (3)
  - (a) The duties and responsibilities of the board shall be in accordance with Sections 58-1-202 and 58-1-203.
  - (b) The board shall designate one of its members on a permanent or rotating basis to:
    - (i) assist the division in reviewing complaints concerning the unlawful or unprofessional conduct of a licensee; and
    - (ii) advise the division in its investigation of these complaints.
  - (c) A board member who has, under Subsection (3)(b), reviewed a complaint or advised in its investigation is disqualified from participating with the board when the board serves as a presiding officer in an adjudicative proceeding concerning the complaint.

**Part 3 - Licensure**

**58-59-301. License required - License issuance.**

- (1) A license is required to engage in practice as a professional employer organization, except as specifically provided in Section 58-1-307 or 58-59-305.
- (2) The division shall issue to persons qualified under the provision of this chapter a license as a professional employer organization.

**58-59-302. Qualifications for licensure.**

Each applicant for licensure as a professional employer organization shall:

- (1) submit an application in a form prescribed by the division;
- (2) pay a fee as determined by the department under Section 63-38-3.2;
- (3) provide documentation that the applicant is properly registered with:
  - (a) the Division of Corporations and Commercial Code;
  - (b) the Division of Workforce Information and Payment Services in the Department of Workforce Services, for the purposes of Title 35A, Chapter 4, Employment Security Act;
  - (c) the State Tax Commission;
  - (d) the Internal Revenue Service; and
  - (e) any other agency identified by rule that is determined by the division and the board as necessary for a person engaged in practice as a professional employer organization;
- (4) provide documentation satisfactory to the division and the board that employees leased by the professional employer organization to any client company are covered by workers' compensation insurance pursuant to Section 34A-2-103;
- (5) provide evidence to the division and the board of financial responsibility, as this evidence is prescribed by rule;
- (6) submit to the division a certified audit performed by an independent certified public accountant showing at least an adjusted net worth of \$50,000 or 5% of total adjusted liabilities, whichever is greater;
- (7) provide evidence satisfactory to the division of the financial responsibility of any self-funded or partially self-funded insurance plan as defined by rule which meets the following requirements:

- (a) the self-funded or partially self-funded plan has purchased adequate excess loss insurance to prevent material adverse impact on the financial condition of the professional employer organization;
- (b) the plan uses a third-party administrator licensed by the state in which the third-party administrator is domiciled;
- (c) the self-funded nature of the self-funded or partially self-funded plan is disclosed to each eligible employee; and
- (d) all self-funded or partially self-funded plan assets, including participant contributions, are held in a trust account;
- (8) provide, for a criminal background check by the division, the name of:
  - (a) any person who has control of or a controlling interest in, as defined in Section 16-10a-102, the professional employer organization;
  - (b) any officer or director of the professional employer organization; and
  - (c) any responsible manager of the professional employer organization or other person if the manager or person has signatory authority over fiduciary funds;
- (9) provide evidence satisfactory to the division that the responsible managers of the professional employer organization have education and experience in the conduct of business that demonstrate a reasonable expectation that the professional employer organization will be managed with the skill and expertise necessary to protect the interests of its employees, client companies, and the public; and
- (10) provide evidence that the applicant is of good moral character.

**58-59-303. Term of license - Expiration - Renewal.**

- (1) The division shall issue each license under this chapter in accordance with a one-year renewal cycle established by rule. The division may by rule extend or shorten a renewal period by as much as six months to stagger the renewal cycles it administers.
- (2) At the time of renewal the licensee shall show satisfactory documentation in accordance with Section 58-59-306 of each of the following renewal requirements:
  - (a) current evidence of financial responsibility; and
  - (b) current evidence of financial responsibility in all self-funded insurance programs.
- (3) Each license automatically expires on the expiration date shown on the license unless renewed by the licensee in accordance with Section 58-1-308.

**58-59-304. Repealed.**

**58-59-305. Exemptions from licensure.**

In addition to the exemptions from licensure in Section 58-1-307 the following are exempt from licensure under this chapter:

- (1) related companies under common ownership that are not individually considered professional employer organizations under this chapter which combine employees of one commonly owned company with employees of another commonly owned company on either a temporary or regular basis; and
- (2) a professional employer organization, which is not domiciled in this state, and which employs less than 25 employees working within this state.

**58-59-306. Financial responsibility.**

- (1) To maintain a license in good standing, a professional employer organization shall demonstrate financial responsibility.
- (2) Financial responsibility shall be demonstrated on:

- (a) a quarterly basis by providing the division with:
  - (i) evidence from an independent certified public accountant, in a form prescribed by the division, that all federal, state, and local withholding taxes, unemployment taxes, FICA taxes, workers' compensation premiums, and employee benefit plan premiums have been paid; and
  - (ii) any other relevant information the division considers appropriate; and
- (b) an annual basis by providing the division with:
  - (i) an audited financial statement prepared in a form prescribed by the division in an independent certified public accountant that includes a review of the payment of all federal, state, and local withholding taxes, unemployment taxes, FICA taxes, workers' compensation premiums, and employee benefit plan premiums; and
  - (ii) any other relevant information the division considers appropriate.

**58-59-307. Records and reports protected.**

Notwithstanding Title 63, Chapter 2, Government Records Access and Management Act, financial information submitted to the division by or at the request and direction of an applicant or licensee for the purpose of supporting a representation of financial responsibility is confidential, is not for public inspection, and is not subject to discovery in civil or administrative proceedings.

**58-59-308. No guarantee.**

By licensing and regulating professional employer organizations under this chapter, the state:

- (1) does not guarantee any right, claim, or defense of any professional employer organization, client company, regular employee, or other person;
- (2) does not guarantee the financial responsibility or solvency of any professional employer organization; and
- (3) does not waive any right, claim, or defense of immunity that it may have under Title 63, Chapter 30, Utah Governmental Immunity Act, or other law.

**Part 4 - Denial of Licensure**

**58-59-401. Grounds for denial of license and disciplinary proceedings.**

The division may refuse to issue a license to an applicant, refuse to renew the license of a licensee, revoke, suspend, restrict, or place on probation the license of a licensee, issue a public or private reprimand to a licensee, and issue cease and desist orders in accordance with Section 58-1-401.

**58-59-402. Court intervention.**

If a professional employer organization is operating without a license or the financial condition of a licensee is impaired to the extent of posing a significant threat to the public, the division may file a complaint in district court asking for:

- (1) injunctive relief;
- (2) the appointment of a receiver;
- (3) the sale of the company to a third party;
- (4) the liquidation of the company; and
- (5) any other appropriate remedy.

## **Part 5 - Penalties**

### **58-59-501. Unlawful conduct.**

Unlawful conduct includes:

- (1) engaging in practice as a professional employer organization without a license;
- (2) offering an employee a self-funded medical program, unless:
  - (i) the program provides its benefits under an employee benefit plan that complies with 29 U.S.C. Sec. 1143 et seq.; and
  - (ii) the program is maintained for the sole benefit of eligible plan participants;
- (3) misrepresenting that any self-funded medical program it offers is other than self-funded;
- (4) offering to its employees any self-funded or partially self-funded medical plan without delivering to each plan participant a summary plan description that accurately describes terms of the plan, including disclosure that the plan is self-funded or partially self-funded;
- (5) providing leased employees to any client company under any provision, term, or condition that is not contained in a clearly written agreement between the professional employer organization and client company;
- (6) any willful, fraudulent, or deceitful act by a licensee, caused by a licensee, or at a licensee's direction, that causes material injury to a client company or employee leased to a client company;
- (7) failing to maintain or ensure that client companies maintain in full force and effect required workers' compensation insurance on all leased employees in accordance with Utah law pursuant to Section 34A-2-103;
- (8) failing to pay in a timely manner any federal or state income tax withholding, FICA, unemployment tax, employee insurance benefit premium, workers' compensation premium, or other obligation due and payable directly as a result of engaging in business as an employee leasing company; and
- (9) failing to comply with federal law regarding any employee benefit offered to an employee.

### **58-59-502. Unprofessional conduct.**

Unprofessional conduct includes:

- (1) failing to establish, maintain, or demonstrate financial responsibility and management competence while licensed as a professional employer organization;
- (2) failing to maintain proper registration with any agency for which registration is required as a condition of licensure under this chapter;
- (3) failing to maintain current lease agreements and employment agreements in appropriate form and content as required under this chapter;
- (4) failing to inform the division of a change in ownership, in the address of its owners or officers, or in its principal business address or change in any responsible manager of the professional employer organization who has signatory authority over company funds within ten days after the change;
- (5) failing to maintain and make available, upon request, to the division and the licensee's workers' compensation insurance carrier:
  - (a) the name and federal identification number of each client company;
  - (b) the number and, if good cause is shown, the names of all covered employees provided to each client company; and
  - (c) the total eligible wages and workers' compensation premiums due to the carrier for the employees provided to each client company;
- (6) failing within 30 days to notify the division and the licensee's workers' compensation insurance carrier of the initiation or termination of a relationship with a client company;

- (7) failing within ten days to notify the division of the failure to pay when due an amount exceeding \$5,000 of any of the following obligations: any federal or state income tax, withholding tax, FICA, unemployment tax, employee insurance benefit premium, or worker compensation premium; and
- (8) any of the following events unless the licensee first obtains written approval from the division for that event:
  - (a) the sale or transfer of a majority of the employee leasing contracts of the licensee;
  - (b) the sale or transfer of a majority of the physical assets of the licensee;
  - (c) the sale or transfer of more than 25% of the ownership interest of a licensee by any means including the sale, transfer, or issuance of a member interest in a limited liability company, the sale, transfer, or issuance of a member interest in a partnership, the sale, transfer, or issuance of a ownership interest in a licensee in any other manner other than the sale or transfer of publicly traded shares of a corporation affected through a public exchange or market; and
  - (d) entering into one or more contracts, other than employee lease agreements with employee leasing clients, which commits the licensee to make future payments to any person or persons in amounts which in total exceed the equity of the business for payment of service provided to or for the licensee.

**58-59-503. Penalty for unlawful conduct.**

- (1) Any person who violates Subsections 58-59-501(1) through (4) is guilty of a third degree felony.
- (2) Any person who violates Subsections 58-59-501(5) through (9) is guilty of a class A misdemeanor.
- (3) Any person who has engaged in unlawful conduct may be assessed the costs associated with the investigations, disciplinary proceedings, court proceedings, or other actions to enforce the provisions of this act.

**PROFESSIONAL EMPLOYER  
ORGANIZATION LICENSING ACT**

**Title 58, Chapter 59  
Utah Code Annotated 1953  
As Amended by  
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